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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 175

TALMADGE RALEY,
JOSEPH STERN,
EMMETT CALVIN BROWN,

Appellants,

v.

STATE OF OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

MORSE JOHNSON,
921 Dixie Terminal Bldg.,
Cincinnati 2, Ohio,

LOUIS C. CAPELLE,
Keith Bldg.,
Cincinnati 2, Ohio.

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APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT AS TO JURISDICTION

Appellants, Talmadge Raley, Joseph Stern and Emmett Calvin Brown, submit the following statement in support of their contention that the questions presented herein are substantial and that there is sufficient basis to invoke the jurisdiction of this Court to review this cause on appeal.

(a) Opinions

The opinion of the Supreme Court of Ohio delivered upon the rendering of the judgment sought to be reviewed is

officially reported in 167 Ohio State 295, together with a dissenting opinion. A copy of these opinions is attached in Appendix "A."

The opinion of the Supreme Court of the United States in the previous appeal of this cause is officially reported in 354 U. S. 929.

The opinion of the Supreme Court of Ohio delivered upon the rendering of the judgment which the previous appeal of this cause sought to have reviewed is officially reported in 164 O. S. 529.

The opinion of the Court of Appeals for the First District of Ohio in this cause is officially reported in 100 Ohio Appellate 75.

A copy of the order and judgment appealed from is attached in Appendix "F."

(b) Grounds for Jurisdiction

(i) This is an appeal pursuant to 28 U. S. C. Section 1257 (2) from a final order made and entered by the Supreme Court of Ohio in which that Court on remand from the Supreme Court of the United States, in which the previous appeal had been docketed, "adhered to" its "Former Judgments." These "Former Judgments" of the Ohio Supreme Court affirmed the judgments of conviction of appellants in the Court of Common Pleas of Hamilton County, Ohio, of contempt in violation of Ohio Revised Code Section 2705.02 (formerly Ohio General Code Section 12137) for refusing to answer certain questions propounded to them by the un-American activities commission of Ohio, which judgments of conviction were affirmed in part and reversed in part by the Court of Appeals for the First Judicial District of Ohio.

(ii) The Supreme Court of Ohio entered its judgment and order from which review herein is sought on February 11, 1958. Appellants' Application for Rehearing was denied

on March 5, 1958. Notice of Appeal was filed in the Supreme Court of Ohio on May 29, 1958.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U. S. C. A. Section 1257 (2):

> "§ 1257. State courts; appeal; certiorari
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(iv) Cases believed to sustain the jurisdiction:

Sweezy v. *New Hampshire*, 354 U. S. 234;
Watkins v. *United States*, 354 U. S. 178;
Barenblatt v. *United States*, 354 U. S. 930—on remand, 252 F. 2d 129;
Sacher v. *United States*, Supreme Ct. No. 828 Oct. Term 1957 decided 5/19/58;
Pennsylvania v. *Nelson*, 350 U. S. 497;
Johnson v. *United States*, 318 U. S. 189;
Ullman v. *United States*, 350 U. S. 422;
Quinn v. *United States*, 349 U. S. 155;
Smith v. *O'Grady*, 312 U. S. 329;
Jack v. *Kansas*, 199 U. S. 372;
United States v. *Rumely*, 345 U. S. 41;
United States v. *Bryan*, 339 U. S. 323;
Counselman v. *Hitchcock*, 142 U. S. 547;
Hoffman v. *United States*, 341 U. S. 479;
Boyd v. *United States*, 116 U. S. 616;
Blau v. *United States*, 340 U. S. 159;

(v) The Ohio Statutes, the validity of which is involved, are Section 101.44 Ohio Revised Code (text set forth in

Appendix "B"), Section 2705.02 Ohio Revised Code (text set forth in Appendix "C"), and Sections 103.31-103.38 Ohio Revised Code, of which Section 103.34 is set forth below and the balance of said sections are set forth in Appendix "D."

"Section 103.34 POWERS AND DUTIES.

The un-American activities commission shall:

(A) Investigate, study, and analyze:

(1) All facts relating to the activities of persons, groups and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(2) All facts concerning persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government, or the industrial potential of this state;

(3) The operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated in this section and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(B) Maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same.

The commission has such additional rights, duties, and powers as are necessary to enable it fully to exercise those specifically set forth in this section and to accomplish its lawful objectives and purposes."

(c) Questions Presented by This Appeal

1. Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing and defining the powers and duties of the Ohio un-American activities commission, as applied to these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that the delegation of authority to the legislative commission was so sweeping, indiscriminate and vague that the constitutionally required preliminary control of the commission by the Legislature was non-existent?

2. Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing and defining the powers and duties of the Ohio un-American activities commission, as applied to these appellants, are in violation of the First and Fourteenth Amendments to the Constitution of the United States for the reason that there was no clear determination by the Ohio Legislature that the authorized inquiry into the area of the freedoms protected by these Amendments was justified by a specific legislative need?

3. Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing the powers and duties of the Ohio un-American activities commission, as applied to these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that appellants as witnesses before the commission were not able to determine from the statutory delegation of authority to the commission, or from any other indicia of the legislative matters under inquiry, whether the questions propounded to them were pertinent to the matter which the Ohio Legislature intended to have investigated?

4. Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing and defining the powers and duties of the Ohio un-American activities commission, as applied to

these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of, the United States for the reason that they authorize and direct a legislative commission to exercise the non-legislative power of exposing individuals for the sake of exposure?

5. Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing and defining the powers and duties of the Ohio un-American activities commission, as applied to these appellants, are unconstitutional because they legislate and authorize legislative investigation in the area of sedition in which area United States Congressional action has preempted and superseded the power of the state?

6. Whether Sections 103.31-103.38, 2705.02 and 101.44 of the Revised Code of Ohio, as interpreted and applied to these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that appellants as witnesses were not directed by said commission to answer questions which formed the counts in the indictments for contempt following appellants' assertion of the privilege against self-incrimination?

7. Whether Sections 103.31-103.38, 2705.02 and 101.44 of the Revised Code of Ohio, as interpreted and applied to these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that although appellants were specifically and repeatedly advised by said commission that they were protected by their constitutional privilege against self-incrimination said Supreme Court of Ohio subsequently held that appellants were in contempt of that commission for asserting their privilege in refusing to answer certain questions because the State Immunity Statute, Ohio Revised Code Section 101.44, removed the need for such privilege?

8. Whether Sections 103.31-103.38, 2705.02 and 101.44 of the Revised Code of Ohio, as interpreted and applied to these appellants, are in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that the State Immunity Statute, Ohio Revised Code Section 101.44, does not and could not grant immunity from prosecution by the United States or other States, particularly in view of the fact that the un-American activities commission of Ohio was authorized and directed by Section 103.34 (B) to make disclosures about matters which could become the basis for prosecution under Federal and State laws to any agency of the Federal, State or local governments?

(d) Statement of Case

(i) Raley, Brown and Stern, the appellants herein, were individually summoned to appear and to testify under oath before the un-American activities commission of Ohio (hereinafter called Commission) at a session held in Cincinnati, Ohio, on October 20, 1952. In that proceeding each appellant was asked many questions and in many instances each appellant refused to answer such questions asserting the privilege against self-incrimination under the constitutional provisions. The appellants were later separately indicted by the Grand Jury of Hamilton County, Ohio for refusing to testify as to certain specified questions asked them in that proceeding, in violation of Revised Code of Ohio Sec. 2705.02 (formerly Ohio General Code Sec. 12137).

Appellant Raley's indictment contained sixteen counts based on the following questions, to all of which appellant Raley asserted the privilege of the Fifth Amendment to the U. S. Constitution and of Article I, Section 10 of the Ohio Constitution in refusing to answer:

1. "Q. Now, Mr. Raley, as an official of the United Electrical workers, is there any concern among the

officials of the possible presence of Communist Party members among the leadership of the UE?"

2. "Q. Now, as a matter of fact, Victor Decavitch was formerly district president of the UE, was he not?"

3. "Q. Now, as a matter of fact, that was the headquarters of Local 766 of the UE at that time; isn't that correct?"

4. "Q. According to the Daily Worker for June 8, 1949, five United Electrical Workers issued statements —five Electrical leaders, pardon me, issued protests against the jailing of Gus Hall, Henry Winston and John Gates, and it listed those five protestors as Lem Markland, Herbert Hirshberg, Joe Sheetz, John Thomas, and Talmadge Raley. Did you as a UE leader issue a protest against the jailing of these three men?"

5. "Q. Do you know Herbert Hirshberg?"

6. "Q. Do you know Joseph Sheetz?"

7. "Q. Do you know John Thomas?"

8. "Q. As a matter of fact every one of these individuals are leaders of the UE, or were leaders of the UE at that time, were they not, Mr. Raley?"

9. "Q. Let me refer to an article carried in the Cincinnati Post on September 13, 1949, captioned, 'Schools Trace Communist Propaganda. Union Agent Denies Kits Are Leftist,' and refers to an interview with you. Do you recall that interview?"

10. "Q. I wonder if you are familiar with, or happen to know Jerome Joseph?"

11. "Q. Victor Pasche; do you know him?"

12. "Q. Do you happen to know Herbert Siens?"

13. "Q. Do you happen to know Marie Reed Haug?"

14. "Q. Do you happen to know Paul Shepherd?"

15. "Q. Isn't it a fact that the people I have just listed are all prominent in the leadership of the UE in Cleveland, Ohio?"

16. "Q. Who has a similar—holds your position in the Cleveland area at the present time, with the union?"

Appellant Stern's indictment contained two counts based on the following questions, to both of which appellant Stern

asserted the privilege of the Fifth Amendment to the U. S. Constitution and of Article I, Section 10 of the Ohio Constitution in refusing to answer:

1. "Q. Where do you reside, Mr. Stern?"
2. "Q. I ask you if it is not a fact that Frank Hashmall assigned you to work in the Progressive Party in this county?"

Appellant Brown's indictment contained four counts based on the following questions, to all of which appellant Brown asserted the privilege of the Fifth Amendment to the U. S. Constitution, or language indicating such privilege, in refusing to answer:

1. "Q. And what has been your educational background?"
2. "Q. Mr. Brown, were you ever employed by the Fisher Body plant at Norwood, Ohio?"
3. "Q. Is there anything about being employed at that plant which might tend to incriminate you?"
4. "Q. Were you active in 1947 in the election in the City of Cincinnati in supporting any candidate or any issue on the ballot in that election?"

Since the cases, although differing as to the wording of each question, involved the same questions of law, by agreement they were tried together before the Court of Common Pleas, Hamilton County, Ohio. Motions to quash, pleas in abatement and demurrers to the indictments were overruled. A jury trial was waived. The chairman, one member, the counsel, and the reporter of the Commission were called by the state as witnesses. They testified as to the procedure of the Commission and the records of the Cincinnati Hearings before which the appellants had been subpoenaed. The cross-examination attempted to determine the purpose of calling the appellants as witnesses and to show that much of the information sought from appellants was already in

the Commission's files. Objections to questions along these lines were frequently sustained. In addition, the cross-examination of the Chairman of the Commission brought out that it was the policy of the Commission not to press for answers to questions considered incriminating since, as to such questions, the witnesses had the right to refuse answers.

The Trial Court found each appellant guilty of contempt as charged under each count in the indictments. Each appellant was sentenced to ten days in jail under each count, the sentences to run concurrently, and each was fined $500.00 and costs under each count, the fines as to all but the first count in each indictment being remitted. A motion for a new trial was overruled.

On appeal, where the cases were consolidated, the Court of Appeals for the First Judicial District of Ohio, after oral arguments and briefs, affirmed the convictions on all counts involving questions asked by a Commission member and reversed on all counts involving questions asked only by the counsel of the Commission.

On appeal, the Supreme Court of Ohio, after oral argument and briefs, affirmed the judgments of conviction and denied the application for rehearing.

An appeal was duly docketed in the Supreme Court of the United States on August 10, 1956. On June 27, 1957 that Court vacated the judgments of the Supreme Court of Ohio and remanded the case for reconsideration in the light of *Sweezy* v. *New Hampshire*, 354 U. S. 234 and *Watkins* v. *United States*, 354 U. S. 178.

On reconsideration, after oral argument and briefs, the Supreme Court of Ohio adhered to its former judgments. The decision was a brief Per Curiam opinion (Appendix "A") in which four of the judges joined, one dissented, and the remaining two who sat did not indicate either a concurrence or dissent. The application for rehearing was denied.

(ii) State in the proceedings and manner in which federal questions were raised.

Questions 1, 2, 3, and 4 (supra pp. 5-6) all come within the holdings and doctrines of *Watkins* v. *United States,* 354 U. S. 178, and *Sweezy* v. *New Hampshire,* 354 U. S. 234. On the remand of this case the Supreme Court of Ohio was ordered by the Supreme Court of the United States to reconsider it in the light of those two cases. These questions were raised and argued both in the briefs and in oral arguments and in the Application for Rehearing (Supplemental Transcript of Record) by the appellants before the Supreme Court of Ohio on such remand. The Supreme Court of Ohio sustained the validity of the statutes involved. In addition these questions were raised in the motion to quash the indictments (Record—Questions of Law) and in all subsequent oral arguments and briefs in the Court of Appeals and Supreme Court of Ohio. These questions were not specifically ruled on by any court until the decision of the Supreme Court of Ohio on the remand.

As to question 5 (supra p. 6), the statute which created the Commission and under which it was organized to act shows on its face that a primary purpose and power of the Commission was to investigate subversive and seditious activities of both persons and groups. The Record of the hearings of the Commission which resulted in the indictments for contempt of appellants herein is attached to the Record and identified as ". . . Report on . . . Cincinnati, Ohio Hearings October 20, 1952" (Exhibit 6), and the "Report of the un-American Activities Commission State of Ohio 1951-1952" is attached to the Record (Exhibit 7). Both demonstrate that the Commission primarily concerned itself with investigating alleged sedition and suspected Communist seditious activities and subversive organizations. In particular, the Cincinnati Hearings (Exhibit 6) show throughout that each appellant herein was interro-

gated as to his possible Communist and subversive activities in Ohio and other states and as to his presumed association with others who were allegedly Communists, or had been convicted or indicted under the Smith Act, or had been accused of plotting the overthrow of the federal government by force.

Appellants questioned the constitutional power of the State of Ohio to investigate and legislate in such area in their brief, reply brief, and oral argument in the Court of Appeals. That Court specifically rejected the assertion that the federal government had by Congressional action superseded the power of the State to act in this area (100 Ohio App. 81-85). Appellants again raised this federal question in the Supreme Court of Ohio as Assignment of Error No. 7 (Transcript of Record, p. 14) and in their brief and oral argument. That Court did not reach this question in its decision. Appellants again raised the question in the Application for Rehearing (Transcript of Record, p. 77) which was denied.

As to question 6 (supra p. 6), the ". . . Report on . . . Cincinnati, Ohio Hearings October 20, 1952" (Exhibit 6) shows throughout that in all but one (Exhibit 6, p. 149), and possibly two (Exhibit 6, p. 99) the appellants were not directed to answer the questions which formed the counts in their indictments, nor were they given any indication that the Commission overruled their assertions of the privilege and considered such assertions contumacious. The Court of Appeals held such direction unnecessary if a member of the Commission asked the question (100 Ohio App. 86-97) and the Supreme Court of Ohio held that the applicability of the state immunity statute deprived appellants of the privilege. This question was again raised on the Application for Rehearing (Transcript of Record, p. 73) which was denied.

As to question 7 (supra p. 6), the trial court and the Court of Appeals did not base their decisions on the applica-

bility of the state immunity statute, although the Court of Appeals rejected appellants' assertion, on brief and oral argument, that it was inapplicable in view of the Commission's assurance to the appellants that the privilege was available (100 Ohio App. 99). The Record (Bill of Exceptions, pp. 28-29) and the decisions of both the Court of Appeals and the Supreme Court, and particularly the dissenting opinion of Judge Stewart (164 O. S. 561), show that the Commission misled the appellants by assuring them of their constitutional right to refuse answers to incriminating questions regardless of the state immunity statute which, in fact, was never referred to. The invalidity of the ruling that the state immunity statute abrogated the privilege against self-incrimination regardless of the assurances given the appellants at the hearing under the Fourteenth Amendment was again raised on the Application for Rehearing (Transcript of Record, pp. 73-75) which was denied.

As to question 8 (supra p. 7), it is clear that the state immunity statute does not and could not grant immunity from prosecution by the federal government and other states. It is also clear that the Commission by its legislative mandate was authorized and directed to investigate subversive activities unlawful under federal and other state laws and to transmit incriminating information received to the federal and other state governments. The Court of Appeals (100 Ohio App. 86) sustained the validity of this statute as did the Supreme Court of Ohio (164 O. S. 539-542) although one judge dissented, asserting the appellants had been denied their rights under the Fifth Amendment to the Constitution (164 O. S. 556).

(e) The Federal Questions Are Substantial

As to question 1 (supra p. 5), the scope of the Commission's authorized inquiry is set out in Ohio R. C. Sec. 103.34 (supra p. 4). Are the safeguards for legislative investi-

gations constitutionally required under *Sweezy*, supra, and *Watkins*, supra, met under such a sweeping, indiscriminate and vague mandate? Is there any preliminary control of the Commission by the parent legislature in this case when the Commission is authorized to:

> ". . . Investigate . . . .
> (2) All facts concerning persons, groups and organizations . . . whose activities might adversely affect the functions of any agency of the state or national government or the industrial potential of this state. . . ."

Can this Court, or any Court, or the Commission itself, state authoritatively and with clarity under such an expansive dominion that the Ohio Legislature had asked the Commission "to gather the kind of facts comprised in the subjects upon which petitioner was interrogated" (*Sweezy*, supra p. 253)?

As to question 2 (supra p. 5), there is nothing in the Record to indicate in any way that the Ohio Legislature made a clear determination that a specific legislative need justified placing the freedoms protected by the First and Fourteenth Amendments in jeopardy. Can witnesses before this Commission be required under penalty of contempt to answer questions concerning their opinions, beliefs and political activities without violating their precious constitutional liberties? Under the holdings of *Watkins*, supra, and *Sweezy*, supra, can appellant Raley be sent to jail for refusing to answer:

> "Q. According to the Daily Worker for June 8, 1949, five United Electrical Workers issued statements—five Electrical leaders, pardon me, issued protests against the jailing of Gus Hall, Henry Winston and John Gates, and it listed those five protestors as Lem Markland, Herbert Hirshberg, Joe Sheetz, John Thomas, and Talmadge Raley. Did you as a UE leader issue a protest

against the jailing of these three men?" (Count 4, supra p. 8.)

"Q. Let me refer to an article carried in the Cincinnati Post on September 13, 1949, captioned, 'Schools Trace Communist Propaganda. Union Agents Denies Kits are Leftist,' and refers to an interview with you. Do you recall that interview?" (Count 9, supra p. 8.)

Can appellant Stern be sent to jail for refusing to answer:

"Q. I ask you if it is not a fact that Frank Hashmall assigned you to work in the Progressive Party in this county?" (Count 2, supra p. 9.)

Can appellant Brown be sent to jail for refusing to answer:

"Q. Were you active in 1947 in the election in the City of Cincinnati in supporting any candidate or any issue on the ballot in that election?" (Count 4, supra p. 9.)

As to question 3 (supra p. 5), certainly under the wide mandate given the Commission (R. C. 103.34 supra p. 4) these appellants as witnesses before it could not determine what subject was under investigation, why they were called as witnesses, and whether or not the questions asked them were pertinent. The chairman simply called the session to order, called the witnesses, and proceeded with the questions without any statement or clarification as to purpose or subject matter. Nor did any other members of the Commission or its counsel define any area of inquiry. All that these appellants had available to determine whether the questions asked were either authorized or pertinent was the broad language of the mandate. Is due process violated when witnesses are compelled to make a determination of pertinence with so little guidance? These appellants frequently inquired as to the purpose of the questioning (Raley—Exhibit 6, p. 71 and p. 92; Stern—Exhibit 6, p.

171) and received no guidance in the replies thereto. In fact, when appellant Brown, unrepresented by counsel, asserted that he did not think the question was any business of the Commission, the chairman replied:

> "We will determine that Mr. Brown." (Exhibit 6, p. 193.)

Under such circumstances, can the knowledge of the subject to which the interrogation is deemed pertinent be deemed to have been available to these witnesses with the degree of explicitness and undisputable clarity as required under *Watkins,* supra, and *Sweezy,* supra?

As to question 4 (supra pp. 5-6), in *Watkins* v. *United States,* 354 U. S. 178 this Court stated:

> ". . . nor is the Congress a law enforcement or trial agency" (at p. 187).
>
> "We have no doubt that there is no Congressional power to expose for the sake of exposure" (at p. 200).

The mandate (Ohio R. C. Sec. 103.34 (B)) specifically directs the Commission to maintain liaison with other federal, state and local governments "in devising and promoting means of disclosing those persons who seek to alter or destroy" the state or United States Government by force, violence, etc. Can witnesses receive due process when subpoenaed to testify before a legislative commission authorized and directed to engage in the very function which this Court has proscribed? More particularly, have these appellants as witnesses before such Commission received due process when subjected to the trial of an almost uninterrupted barrage of the "Is it not a fact" cross-examination (Raley—Exhibit 6, pp. 79-108; Stern—Exhibit 6, pp. 156-171; Brown—Exhibit 6, pp. 194-200)? Do legislative investigating bodies violate due process when they reveal an attempt to decoy a witness into a possible perjury indictment

as shown by the Chairman's response to appellant Brown's inquiry as to the proof of the factual assertion contained in an "Is it not a fact" question:

> "The proof will be forthcoming. The moment you deny under oath that you were present at that Communist Party convention as a delegate from Cincinnati" (Exhibit 6, p. 200).

Are the requirements for legislative investigations defined in *Sweezy* v. *United States*, 354 U. S. 234, violated when the questioning of witnesses demonstrates (Exhibit 6) that "the investigators had thoroughly prepared for the interview and were not acquiring new information as much as corroborating data already in their possession" (*id.* at p. 248)?

As to question 5 (supra p. 6), this Court held in *Pennsylvania* v. *Nelson*, 350 U. S. 497, that Congress had occupied the field of sedition and subversive activities to the exclusion of parallel state legislation, that the dominant interest of the federal government precluded state intervention and that administration of state acts would conflict with the operation of the federal plan. Appellants have been convicted of contempt of a state legislative commission the title of which—un-American activities commission of Ohio—and the legislative mandate under which it acted (supra p. 4) clearly show that the state was legislating, intervening and administering in the field of sedition and subversive activities. Can a state be without constitutional power to enact criminal sedition laws and still constitutionally compel testimony from its citizens under penalty of contempt as to acts of subversion and sedition? Can citizens be constitutionally fined and sentenced for refusing to give testimony before a state commission empowered to investigate and recommend legislation in furtherance of powers which the state cannot constitutionally exercise?

As to question 6 (supra p. 6), to all but one, possibly two, questions which formed the counts of the indictments herein, appellants' assertion of their privilege was as far as appellants knew accepted by the Commission. No direction to answer was given to appellants. The Commission in no way apprised the appellants that it rejected their invocations of the privilege. Is it due process of law under the Fourteenth Amendment to punish a witness for not testifying under oath when the authority before which he is testifying requires him to guess whether it considered his assertion of the privilege contumacious? Under *Quinn* v. *United States*, 349 U. S. 155, and other cases, is not a clear disposition of the witness's objection a prerequisite to a prosecution for contempt under the due process clause of the Fourteenth Amendment? Is not the breach of a "long standing tradition" in the United States and other English-speaking countries that witnesses must be apprised of the rejection of their constitutional objection to a question in violation of the Fourteenth Amendment?

As to question 7 (supra p. 6), the courts below recognized that appellants were clearly, unequivocally and frequently advised by the Commission that they could refuse to answer questions which might tend to incriminate them. The Commission, although not specifically referring to the statute, in effect ruled that appellants were not protected by the state immunity law. The Supreme Court stated (164 Ohio State 548) that the Chairman had "misstated the law" to the appellants. That Court held, nevertheless, that the appellants were protected by the immunity statute, were not entitled to the privilege, and were, therefore, guilty of contempt. Is it due process of law to impose a jail sentence and fine on appellants for merely asserting what they believed to be a basic constitutional right after they were instructed by the presiding officer at the hearing that they had such right? Under *Smith* v. *O'Grady*, 312 U. S. 329, is it due

process for a legislative agency of the state to mislead appellants as to their constitutional rights which the Supreme Court of the state later holds they did not have and by reason thereof are guilty of contempt? Have the constitutional rights of these appellants been violated when they have been found guilty of contempt despite the findings and reasoning of Judge Stewart in his dissenting opinion at 164 O. S. 561:

> "It seems to me that, since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it except possibly as to the questions which the defendants were directed to answer."

As to question 8 (supra p. 7), the state immunity statute (Appendix "B") does not and cannot grant immunity from prosecution by the federal government and other states. The Commission was authorized and directed to investigate matters involving violation of federal and other state laws and to maintain a liaison with federal and other state agencies concerning unlawful subversive acts. Appellants in testifying before the Commission knew, therefore, that any incriminating testimony would be transmitted to the federal government and other states for use in prosecution. Judge Hart in his dissenting opinion (164 O. S. 556) asked:

> "How then, notwithstanding some apparent obiter in decisions of the federal Supreme Court, can a state immunity statute, which compels a witness to answer questions which incriminate him and which admittedly in turn may be used to incriminate him in a federal prosecution where the state immunity statute even against prosecution is wholly inoperative to protect

him, be valid in view of the constitutional rights of the witness under the Fifth Amendment to the federal Constitution among which is the over-all right to avoid compulsory self-incrimination?"

If the constitutionality of the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. (Supp. II) Sec. 3846 is sustained in *Ullman* v. *United States*, 350 U. S. 422, on the ground that it protected a witness from prosecution as to matters testified to in any court, state or federal, how can a state immunity statute which does not protect the witness either from prosecution (or use of his testimony in the prosecution) in the federal or other state courts be deemed an adequate constitutional substitute for the constitutional right of protection against self-incrimination?

The statutes of Ohio in question as interpreted and applied by the Supreme Court of Ohio, therefore, present to this Court substantial federal questions under the United States Constitution.

Respectfully submitted,

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